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No. 81-2408

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STEELWORKERS, LOCAL 2602 - - Petitioner

versus

DONALD C. FLOWERS

and

KING E. JONES - - - - - Respondents

On Appeal From the Second Circuit Court of Appeals

BRIEF OF AMICUS CURIAE

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PRELIMINARY MATTER

QUESTIONS PRESENTED

Should the Supreme Court ruling in U.A.W. v. Hoosier Cardinal Corp. 383 U. S. 696 (1966) that the applicable state statute of limitations be applied to suits brought under Section 301 of the Labor Management Relations Act or should that ruling be abandoned and the more restrictive six month limitation period of Section 10(b) of the National Labor Relations Act be applied to suits brought under Section 301 L.M.R.A.?

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INTEREST OF GORDON L. HIGGINS

Gordon L. Higgins is plaintiff in a lawsuit brought under Section 301 of the Labor Management Relations Act against Claremont Transfer Company and Teamsters Local Number #89. Higgins lawsuit was brought approximately two years after his wrongful termination by Claremont Transfer Company. Through a myriad of summary judgment motions, defendants have alleged that Higgins did not comply with the applicable statute of limitations for filing a lawsuit under section 301 of the Labor Management Relations Act. In one of these motions for summary judgment,

defendants were successful in reliance upon the Sixth Circuit Court of Appeals decision in *Badon et al.* v. *G.M.C.,* 679 F. 2d 93 (6th Cir., No. 80-1730, May 25, 1982) wherein the Circuit Court decided that the six month limitations period for filing a charge under the National Labor Relations Act should apply rather than the applicable state statute.

The District Court subsequently set aside the summary judgment entered agianst Plaintiff Higgins at least partially in reliance upon *Gray* v. *International Association of Heat and Frost Insulators and Asbestos Workers Local No. 51,* 416 F. 2d 313 (6th Cir., 1969) in which the Sixth Circuit Court of Appeals ruled that the applicable statutes of limitations to be applied to LMRA Section 301 suits in Kentucky is the five year statute of limitations contained in Kentucky Revised Statute (KRS) 413.120(2) which defines the statute of limitations in actions based upon liabilities created by statute.

The statute of limitations in Section 301 lawsuits is of critical importance in Higgins case.

Higgins accordingly has a vital interest in the statute of limitations in suits brought under Section 301 of the Labor Management Relations Act. A decision limiting the limitations period for bringing a suit under Section 301 of the L.M.R.A. may foreclose to Higgins litigation in the Courts of the Sixth Circuit. Appellant and Appellee have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The decision below raises issues of great importance. In this brief we attempt to show that the decisions of the lower courts applying the sixth month limitations period for filing a charge under the National Labor Relations Act to suits brought under Section 301 of the Labor Management Relations Act is contrary to the decision of the Supreme Court in *U.A.W.* v. *Hoosier Cardinal Corp.,* 383 U. S. 696 (1966) which says that the applicable state statute of limitations should apply. The Congress of the United States and the legislatives of each of the fifty states have had ample opportunity to legislate a limitations period for filing suit under Section 301 of the LMRA since 1967 if they were unhappy with the ruling of the Supreme Court or with the limitations periods as determined by the courts. They have not done so.

The limitations period as defined in *U.A.W.* v. *Hoosier Cardinal Corp., supra,* allows each state to temper the limitations period to the labor climate within that state.

In any event, the six month limitations period allowed by the National Labor Relations Act for the filing of charges under that act is too short to be applied to suits brought under Section 301 of the Labor Management Relations Act where the question is the filing of a charge under the National Labor Relations Act, the infraction is normally definite. In a Section 301 L.M.R.A. case, on the other hand, in many if not most instances the employee may not learn of any improper

representation of his case until months after the hearing. During the period of termination both the company and the union may make promises to the employee that he will be rehired, thereby passifying the terminated employee until after his statute of limitations period has run if the six month statute of limitations period is allowed to stand.

Finally, rights under Section 301 of the Labor Management Relations Act are not as well known as are rights under the National Labor Relations Act or the Civil Rights Act of 1964. After the employee learns he has been damaged it may take him some time to learn what his rights under the law are.

The Second Circuit Court of Appeals in *Flowers* v. *Steelworkers, 2602* correctly applied prior judicial decisions and properly applied the correct state statute of limitations to the action against the union when it applied the three year limitation period for new medical malpractice.

ARGUMENT

The decision of the Supreme Court in *U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966) is clear, concise and sound and precludes the application of the 6 month limitations period of 10(b) of the National Labor Relations Act to Section 301 L.M.R.A. suit.

In 1966 the Supreme Court ruled in *U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966) that the appropriate limitations period for the filing of a lawsuit under Section 301 of the Labor Management Rela-

tions Act should be the appropriate state statute of limitations. The Court in ruling on that case said:

> "That Congress did not provide a uniform limitations period for Section 301 suits is not an argument for judicially creating one, unless we ignore the context of this legislative omission. It is clear that Congress gave attention to limitations problems in the Labor Management Relations Act, 1947; it enacted a six months' provision to govern unfair labor practice proceedings, 61 Stat. 146, 29 U.S.C. § 160(b) (1964 ed.) and it did so only after appreciable controversy. In this context and against the background of the relationship between Congress and the Courts on the question of limitations provisions it cannot be fairly inferred that when Congress left § 301 without a uniform time limitation, it did so on the expectation that the Courts would invent one. As early as 1830 this Court held that state statutes of limitations govern the timeliness of federal courses of action unless Congress has specifically provided otherwise. *U.A.W.* v. *Hoosier Cardinal Corp., supra* at 703, 704."

Subsequently the Sixth Circuit Court of Appeals ruled in *Gray* v. *International Association of Heat and Frost Insulators and Asbestos Workers Local No. 51,* 416 F. 2d 313 (1969) that the statute of limitations to be applied to L.M.R.A. § 301 suits in Kentucky is the five year statute of limitations contained in KRS 413.120(2). The Court therein stated:

> "Finally we agree with the District Judge that since the Labor Management Relations Act provides no specific period of limitation for the insti-

> tution of unfair representation actions, timeliness should be determined by reference to the appropriate state limitation on similar suits . . . Accordingly we hold that he correctly concluded that the five year Kentucky limitation in actions based upon liabilities created by statute is applicable to the claim that Local 51 breached its statutory duty of fair representation . . ." (KRS § 413.120(2)).

The Gray decision clearly followed the ruling of the Supreme Court as set forth in *U.A.W.* v. *Hoosier Cardinal Corp., supra,* set forth above.

Other Federal Courts both at the district and appellate level have arrived at and developed the statutes of limitations in § 301 suits based upon the applicable state statute of limitations.

In *United Parcel Service Inc.* v. *Mitchell,* 451 U. S. 56 (1981), the United States Supreme Court addressed the question of the appropriate statute of limitations to apply in a § 301 suit brought by a discharged employee against his former employer and labor union alleging that his discharge was in violation of the labor agreement between the employer and the union. In that case, the court determined that the action was banned by a state statute of limitations governing suits to set aside arbitration awards, rather than the breach of contract limitation period.

The court said therein, affirming *Auto Workers* v. *Hoosier Cardinal Corp., supra:*

> "Congress has not enacted a statute of limitations governing actions brought pursuant to § 301 of the L.M.R.A. As the court pointed out in Auto

> Workers v. Hoosier Cardinal Corp., 383 U. S. 696, 704-705, 86 S. Ct. 1107 (1966), 'The timeliness of a § 301 suit . . . is to be determined, as a matter of Federal Law, by reference to the appropriate state statute of limitations . . .' "

The Seventh Circuit Court of Appeals in *Davidson* v. *Roadway Express, Inc.*, 650 F. 2d 902 (1981) overruled an Indiana Federal District Court which had applied the state's six year limitation period and ruled that the appropriate statute of limitation was that set forth in Indiana Code § 34-4-3-13 (1976), which provides for a 90 day period in which to set aside an arbitration award, adopting the rationale of Mitchell and specifically rejecting the application of the six month limitation period for appealing an arbitration decision as set forth in Section 10(b) of the National Labor Relations Act.

Other Federal Courts have rejected the application of Section 10(b) of the National Labor Relations Act while applying state arbitration act limitations to § 301 suits. *Scott* v. *Chrysler Corporation* (1982) 4 Lab L. Rep. 19, 797 (CCH) (E. D. Mich. 1981); *Kikos* v. *Teamsters*, 526 F. Supp. 110 (E. D. Mich. 1981); *Rigby* v. *Roadway Express Company, Inc.*, [1982] 4 Lab. L. Rep. 19, 995 (CCH) (S. D. Miss., 1981); *McQuay* v. *Bethlehem Steel Corporation* [1982] 4 Lab. L. Rep. 19, 815 (CCH) (D.C. Md. October, 1981). *Bigbie* v. *Teamsters*, 530 F. Supp. 402 (N. D. Ill. 1982).

All of these cases apply a state statute of limitations and reject the use of the limitations period of 10(b) of the National Labor Relations Act to § 301 suits.

In the case of *Flowers* v. *Steelworkers, Local 2602* the court determined that the applicable state statute of limitations applied to § 301 case rather than applying 10(b) of the National Labor Relations Act.

The court in *Flowers,* correctly determined that this action against the union is derived from a different duty than is the action against the company. The action against the company comes through the collective bargaining agreement while the duty of the union to represent the individual is as the court correctly interprets very similar to a malpractice action. Claims against the Union are not subject to prior arbitration and therefore as ruled by the Second Circuit, statutes of limitations for the appeal of arbitration awards should not be applied to suit against labor unions.

The Sixth Circuit Court of Appeals, has seen fit to abandon the ruling in *U.A.W.* v. *Hoosier Cardinal Corp.* and *Mitchell* and forged its own rule in *Badon* v. *General Motors Corporation,* 679 F. 2d 93, No. 80-1730 (6th Cir. May 25, 1982). There the Court stated that when a state statute of limitations for appealing arbitration decisions does not exist, then the statute of limitations of 10(b) of the National Labor Relations Act applies:

> "In summary, we are left without guidance by the state of Michigan with respect to the time period within which actions to vacate labor arbitration awards must be brought. We must therefore de-

> cide this federal question on the strength of our own reasoning. That process leads us to conclude that the most appropriate statute of limitations under these circumstances is the six month period found at section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b). Although that period specifically governs unfair labor charges brought before the National Labor Relations Board, the policy behind that same period applies with equal force when similar charges are brought to a federal court under section 301 of the L.M.R.A. . . ."

The Sixth Circuit Court of Appeals completely misinterpreted the Hoosier Cardinal Corp. decision and the Mitchell decision.

Under the two decisions, the statute of limitations in a § 301 case is the most appropriate statute of limitations. Under Mitchell, if a state arbitration statute with a limitations period exists, that statute of limitations period is applicable to L.M.R.A. § 301 suits. However, if no state arbitration statute with a limitations period exists, the courts must look to find the appropriate state statute of limitations. It is not appropriate for the Court to use 10(b) of the National Labor Relations Act when an appropriation state statute governing the time limitation for filing a law suit based upon a written or oral contract is in existence. Likewise, decisions which apply the 30-day limitation period of the Federal Arbitration Act, 9 U.S.C. 12 (1976), such as *Service Employees, Local No. 36* v. *Office Services Center, Inc.*, 670 F. 2d 404 (3rd Cir. 1982) must be overruled. Again, under

Hoosier Cardinal Corp. the courts must look to the applicable state statute of limitations.

Again, even if the thirty day limitation period of 9 U.S.C. 12 did apply to § 301 L.M.R.A. suits, it would apply only to suits against the employer for breach of contract and not to suits against labor unions for improper representation.

The Congress of the United States and the Legislatures of the fifty states have had seventeen years to establish a limitations period for § 301 L.M.R.A. suits if they were unhappy with the ruling in Hoosier Cardinal Corp. It is unnecessary for the court to overrule its decision in this case.

Further, the six month statute of limitations period allowed by the National Labor Relations Act for the filing of charges under the act is too short to be applied to suits brought against labor unions under § 301 of the Labor Management Relations Act. In charges brought under the National Labor Relations Act, the date and time of the infraction is normally definite. However, in a L.M.R.A. § 301 case, the employee may not learn of any improper conduct on the part of the union in handling his claim for several months or longer. Oftentimes infractions by the Union and the Company in § 301 L.M.R.A. cases involve clandestine meetings between the company and the union, they may involve grievance tradeoffs that are not immediately apparent to the employee. Oftentimes in cases involving discharge the union and the company may promise the discharged employee reinstatement at a future date or employment at another company. Generally the

employee does not realize he has been wronged until these promises have been continually broken.

The notice of § 301 L.M.R.A. suits makes them difficult to investigate. Using a very short statute of limitations as that of 10(b) of the National Labor Relations Act could result in the courts being clogged with § 301 L.M.R.A. suits, many of which could have been resolved or may never have been filed had time been allowed for careful investigation.

Finally, rights under such statutes as the Civil Rights Act of 1964 and the National Labor Relations Act are much better understood and responsibilities under those statutes are much better understood than are rights and responsibilities under § 301 of the Labor Management Relations Act. Employees upon dicharge may as a matter of cause file charges with the National Labor Relations Board and the Equal Employment Opportunity Commission. Charges filed with these agencies can be filed by the average individual without the aid of an attorney. Suits brought under § 301 of the Labor Management Relations Act require the preparation and filing of pleadings in Federal Court. The initiation of this type of proceeding is not well known to the average person and normally involves the retaining of an attorney by the individual and normally the payment of a retainer or hourly fee to the attorney. The competent attorney then wishes to investigate the case before filing a lawsuit. All of this could be seriously hampered by an overly restrictive statute of limitations as that of 10(b) of the National Labor Relations Act.

In many instances, the employee may not even contact an attorney until after the National Labor Relations Board has rejected his claim. If the statute of limitations of 10(b) of the National Labor Relations Act is applied to suits under § 301 L.M.R.A. the statute of limitations on the employee's claim may have run before the N.L.R.B. has rejected his claim and he has contacted an attorney to determine what other rights he may have. Whenever a specific act is silent as to time limitation, the applicable state statute of limitations has always applied.

CONCLUSION

In the interest of justice it is critical that the Court continue applying the appropriate state statute of limitations as defined by the Court in *U.A.W.* v. *Hoosier Cardinal Corp., supra,* to § 301 L.M.R.A. suits. Where a state artbitration statute with an appropriate limitation period exists it may be applied to § 301 L.M.R.A. suits. However, where a state arbitration statute with an applicable limitation period is silent, the courts should continue to apply the appropriate state statute rather than § 10(b) of the National Labor Relations Act to § 301 L.M.R.A. suits. The court in *Flowers* v. *Steelworkers, Local 2602* correctly applied the New York statutes for nonmedical malpractice to the L.M.R.A. § 301 not against the labor union. It has been seventeen years since the ruling in *U.A.W.* v. *Hoosier Cardinal Corp., supra* and in that time the Congress of the United States and the legislatures of the individual states have had ample opportunity to

establish limitations period if they were unhappy with the ruling of the Court.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that a copy of the attached was mailed this 28th day of February, 1983 to the Hon. Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543 and to Hon. Robert M. Weinberg and Hon. David M. Silberman, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036.

Michael L. Boylan